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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No. 652

CLEO SYRUP CORPORATION,
Petitioner,

vs.

THE COCA-COLA COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

and

BRIEF IN SUPPORT THEREOF.

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SUBJECT INDEX.

	Page
Petition for Writ of Certiorari	1–7
Summary and Short Statement of the Matter Involved	2
Jurisdiction	5
Questions Presented	6
Reasons for Granting the Writ	7
Brief in Support of Petition for Writ of Certiorari	9–37
Opinions of the Courts Below	9
Grounds on Which Jurisdiction is Invoked	9
Statement of the Case	9
Specification of Errors	10
Summary of Argument	11
Argument	12
Coca—the Descriptive Name of a Drug	12
Cocaine Initially an Ingredient or Element of Respondent's Coca-Cola Syrup and Beverage	13
The Word Coca Not a Trade-Mark at Common Law	14
Coca-Cola a Food	15
Coca, on Respondent's Syrup and Beverage, False	15
This Court's Acquaintance with Coca-Cola	16
Federal Food, Drug, and Cosmetic Act of 1938	21
One Cannot Acquire a Right by His Own Wrong – Coca on Respondent's Beverage a Misbrand Under the Food, Drug, and Cosmetic Act of 1938	25
Conclusion	36

Table of Cases Cited.

Amoskeag Mfg. Co. v. Trainer, 101 U. S., 51..... 14
Armstrong Paint & Varnish Works v. Nu-Enamel Corporation, 305 U. S., 315..... 15
Booth v. Greer Investment Co., 7 Fed. Sup., 576..... 26
Brown Chemical Co. v. Meyer, 139 U. S., 540..... 14
Canal Co. v. Clark, 13 Wall. (U. S.), 311..... 14
Coca-Cola Company v. Koke Company of America, 254 U. S., 143 .....16, 26
Columbia Mill Co. v. Alcorn, 150 U. S., 460..... 14
Elgin National Watch Company v. Illinois Watch Case Company, 179 U. S., 665..... 29
Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co., 128 U. S., 598..... 14
Johnson & Johnson v. Seabury & Johnson, 67 Atl., 36.. 34
Lawrence Manufacturing Co. v. Tennessee Manufacturing Co., 138 U. S., 537.....14, 29
Leeds & Catlin Company v. Victor Talking Machine Company, 213 U. S., 301, 318..... 26
Mercoid Corporation v. Mid-Continent Investment Company *et al.*, 64 S. Ct., 268.....6, 26
Mishawaka Rubber & Woolen Mfg. Co. v. Kresge Co., 316 U. S., 203..... 6
Morton Salt Co. v. G. S. Suppiger, 314 U. S., 488.....6, 27
Muncie Gear Works v. Outboard Marine & Mfg. Co., 315 U. S., 759..... 6
Standard Paint Co. v. Trinidad Asphalt Mfg. Co., 220 U. S., 446-453..... 14
Sterns Co. v. U. S., 291 U. S., 54..... 26
Thaddeus Davids Co. v. Davids, 233 U. S., 159..... 15
United States v. Dr. David Roberts Veterinary Co., 104 Fed. (2d), 785..... 35

United States v. Forty Barrels of Coca-Cola, (C. C. A. 6) 215 Fed., 540 ..... 15, 26
United States v. Forty Barrels and Twenty Kegs of Coca-Cola, 241 U. S., 264 16
United States v. Ninety-Five Barrels Vinegar, 265 U. S., 438 ..... 15, 23
United States v. Schider, 246 U. S., 519 23
Warner & Co. v. Lilly & Co., 265 U. S., 526 14
Weeks v. United States, 224 Fed., 69 15
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Federal Food, Drug, and Cosmetic Act of 1938, U. S. C., Title 21, Chapter 9 ..3, 6, 13, 14, 15, 21, 22. 25, 28, 29, 32, 34
Federal Harrison Anti-Narcotic Act, U. S. C., Title 21, Chapter 6 12
Judicial Code, Title 15, Sections 81 and 98 ..... 5, 6

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Cleo Syrup Corporation, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered December 28, 1943, in the above-entitled cause.

A certified transcript of the record in this case, including the proceedings in the Circuit Court of Appeals, is furnished herewith, in compliance with Rule 38 of this Court.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

Since in or about 1935, petitioner has been marketing under the name Cleo Cola a soft drink syrup and a soft drink or beverage made therefrom.

Since in or about 1887, respondent and its predecessors in business have been marketing under the name Coca-Cola a syrup and a soft drink or beverage made therefrom.

In 1942, respondent instituted this proceeding in the United States District Court at St. Louis, Missouri, alleging that petitioner, in and by its use of the name Cleo Cola in connection with its syrup and beverage, was infringing respondent's trade-mark and good-will rights under the name Coca-Cola for respondent's syrup and beverage and was unfairly competing with respondent in the sale of its Coca-Cola syrup and beverage, and praying an injunction in the premises.

In its answer, petitioner denied the charge or allegation of trade-mark infringement and unfair competition and, among other defenses, alleged "that the syrup or beverage merchandised or sold by plaintiff", respondent, "under the name or phrase 'Coca-Cola' is misbranded under and within the meaning of the Federal Food, Drug, and Cosmetic Act and particularly Section 343 and the several sub-paragraphs or divisions thereof" (R. 1128-1129), and that hence plaintiff, respondent, was not entitled to any relief, even if the Court should find infringement by petitioner, defendant, of plaintiff's, respondent's, trade-mark or good-will rights.

The Record is conclusive that the word "Coca", continuously since at least as early as 1872, has been, and continues to be, the generic term, the descriptive name, the common appellative, the official name recognized by the United States Pharmacopoeia, of a drug possessing definite properties and characteristics and of which cocaine is the principal element or constituent.

The syrup and beverage merchandised under the name Coca-Cola by respondent and its predecessors initially contained as an element or constituent "the valuable tonic and nerve stimulant properties of the coca plant" (R. 424-425, 434, 2075, 2122), but admittedly (R. 1370) had not for many years prior to the institution of this proceeding embodied, as an element or ingredient, cocaine or other "valuable tonic and nerve stimulant properties of the coca plant".

The Federal Food, Drug, and Cosmetic Act of 1938, Section 343, provides that—

> "A food shall be deemed to be misbranded—
>
> "(a) If its labeling is false or misleading in any particular."

Hence petitioner's defense that the application by respondent of the name Coca-Cola to respondent's syrup and beverage from which the principal or active element of the coca plant is absent and omitted constitutes a misbranding under the provisions of the Federal Food, Drug and Cosmetic Act of 1938.

By its decree (R. 2177), the District Court enjoined petitioner from using, in connection with the manufacture or sale of any soft drink or soft drink syrup, the name Cleo Cola as at the date of its decree by petitioner used and displayed. The District Court, however, failed to make any findings of fact or conclusions of law with respect to the special defense of misbranding, by petitioner set up in its answer and which petitioner endeavored to establish in and by the proofs and evidence in this cause.

In its appeal before the United States Circuit Court of Appeals for the Eighth Circuit, petitioner again asserted, as a defense in this cause, "That the name or phrase Coca-Cola, as used and applied by appellee," respondent, "on and in connection with its soft drink syrup and beverages made therefrom, is inherently false and deceptive

and violative of and contrary to the public interest and the public policy of this country," as made known and declared by the Federal Food, Drug, and Cosmetic Act of 1938—"that hence appellee," respondent, "is before the Court with unclean hands and consequently entitled to no consideration, respect, or relief whatsoever" (R. 2208-2209).

The Court of Appeals affirmed the decree of the District Court and in its opinion, in commenting on petitioner's defense of misbranding, said (R. 2209)—

> "The business, the trade-mark, and the product of the plaintiff are all so well known that they do not require description. The trade-mark 'Coca-Cola' has long since come to mean the beverage produced and sold by the plaintiff. To the public generally, the trade-mark means nothing else. The question raised by the defendant's second contention was effectively put to rest by the Supreme Court of the United States in Coca-Cola Company v. Koke Company of America (1920), 254 U. S. 143, in which that court said (p. 145 of 254 U. S.)—
>
> > "'* * * Whatever may have been its original weakness, the mark (Coca-Cola) for years has acquired a secondary significance and has indicated the plaintiff's (Coca-Cola Company's) product alone.'
>
> "And (p. 146)—
>
> > "'* * * The name (Coca-Cola) now characterizes a beverage to be had at almost any soda fountain. It means a single thing coming from a single source, and well known to the community. It hardly would be too much to say that the drink characterizes the name as much as the name the drink. In other words Coca-Cola probably means to most persons the plaintiff's familiar product to be had everywhere rather than a compound of particular substances. Although the fact did not appear in United States v. Coca-Cola Co., 241 U. S. 265, 289, we see no reason to doubt that, as

> we have said, it has acquired a secondary meaning in which perhaps the product is more emphasized than the producer but to which the producer is entitled.'
>
> "See also Dixi-Cola Laboratories v. Coca-Cola Co., 4 Cir., 117 F. 2d 352, 354 (certiorari denied 314 U. S. 629). One certainly cannot be charged with misbranding or misdescribing a product by calling it what it is. There is no merit in the contention that a court of equity will not afford protection to the plaintiff's trade-mark or prevent its good will from being nibbled away by unfair competitors."

Neither this Court nor the public in general is particularly interested or concerned in whether or not petitioner's trade-mark or name Cleo Cola, even as at any time by petitioner used and displayed, infringes or trespasses any trade-mark or good-will rights that respondent may have in, to, or under the name or phrase Coca-Cola.

Petitioner believes and submits, however, that the public generally is greatly interested in knowing whether or not respondent's syrup and beverage, which admittedly does not contain cocaine, the principal ingredient of coca, is, by reason of the denominating use thereon by respondent of the word Coca, misbranded under the provisions, or within the meaning, of the present Federal Food, Drug and Cosmetic Act.

Petitioner humbly submits that the Court of Appeals has taken an erroneous view of the situation under the pleadings and evidence in this cause. Hence this petition.

JURISDICTION.

1. This is an action arising under the trade-mark laws of the United States, Judicial Code, Title 15, Section 81 *et seq.*, and is between citizens of different States wherein the amount involved is in excess of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

2. The jurisdiction of this Court is invoked under Section 98, Title 15, of the Judicial Code, and also by reason of the public importance of the questions involved.

3. The date of the judgment which petitioner seeks to have reviewed is December 28, 1943.

4. Among the cases supporting the jurisdiction to issue the writ, where questions of federal law of far reaching public importance are involved, even where there are no conflicting decisions, are—

Muncie Gear Works v. Outboard Marine & Mfg. Co., 315 U. S. 759;
Mishawaka Rubber & Woolen Mfg. Co. v. Kresge Co., 316 U. S. 203;
Morton Salt Co. v. G. S. Suppiger, 314 U. S. 488;
The Mercoid Corporation v. Mid-Continent Investment Company *et al.*, 64 S. Ct. 268.

QUESTIONS PRESENTED.

1. May rights in the nature of trade-mark or good-will rights be, in view of the provisions of the Federal Food, Drug, and Cosmetic Act of 1938, successfully asserted in or to a descriptive word or name—a word or name having a dictionary meaning, when applied and used for a long period of time upon a product from which the element or constituent indicated by the dictionary meaning of such word or name is absent or omitted and to the nature of which product such word or name is hence inherently false?

2. Does the word Coca, as employed by respondent on a soft drink or beverage from which the principal constituent of the coca plant is absent and omitted, constitute a misbranding under and within the meaning of the Federal Food, Drug, and Cosmetic Act of 1938, even if it be that such word has come in a secondary sense to indicate respondent's syrup and beverage?

REASONS FOR GRANTING THE WRIT.

Petitioner submits that the questions here presented are indeed of great public interest and present phases of the federal statutes having to do with trade-marks and with foods, drugs, and cosmetics, which have not heretofore been, but which should be, settled by this Court.

Wherefore, it is respectfully submitted that the writ of certiorari should be issued to the United States Circuit Court of Appeals for the Eighth Circuit, to the end that the questions presented may be reviewed by this Court, that the judgment of the Circuit Court of Appeals be reversed, and that petitioner have such other and further relief in the premises as may be proper.

Respectfully submitted,

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PAUL L. HALE,
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